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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ARIZONA GOVERNING COMMITTEE FOR
TAX DEFERRED ANNUITY AND DEFERRED COMPENSATION
PLANS, STATE OF ARIZONA, *et al.*,
Petitioners,

v.

NATHALIE NORRIS, on behalf of herself and
all other similarly situated,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals for the Ninth Court**

BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

The Equal Employment Advisory Council (EEAC) respectfully submits this brief amicus curiae in support of the petitioners with written consent of all parties. The parties' consents have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

The Equal Employment Advisory Council (EEAC) is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the em-

ployer community in the United States, including both individual employers and trade and industry associations. Its governing body is a board of directors composed primarily of experts and specialists in the field of equal employment opportunity whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements. The members of EEAC are firmly committed to the principles of nondiscrimination and equal employment opportunity.

Substantially all of EEAC's members, or their constituents, are subject to the provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, and the Equal Pay Act of 1963, 29 U.S.C. § 206(d). Although this case arises under Title VII, the affirmative defenses of the Equal Pay Act have been incorporated into Title VII "to permit employers to defend against charges of [sex] discrimination where their pay differentials are based on a bona fide use of 'other factors other than sex.'" *County of Washington v. Gunther*, 101 S. Ct. 2242, 2248 (1981).

EEAC's members are vitally interested in the issues presented in this case. The lower courts found that the employer violated Title VII because one option of its voluntary deferred compensation program was a lifetime annuity which employees could purchase from one of several insurance companies that relied upon sex-based mortality tables. Because of those tables, female annuitants would receive smaller monthly payments than male annuitants.

There are virtually no insurance industry-provided life annuity plans that do not use similar longevity tables. This is true whether the annuity is purchased on an individual basis or through employer-sponsored group programs. This Court previously has recognized that a retirement plan would not be unlawful under Title VII if

male and female contributions were equal as long as the plan also "let each retiree purchase the largest benefit which his or her accumulated contributions could command in the open market." *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 718 (1978). The Arizona plan here provided the open market option sanctioned in *Manhart*. Arizona, however, was faulted by the lower courts for further assisting its employees to purchase life annuities from insurance companies by presenting them with a choice of policies from several companies that had been screened by the employer for participation in the program.

The Ninth Circuit's decision puts at risk virtually any employer-operated or sponsored retirement, pension or deferred compensation plan where payments are based upon industry-accepted standards. A large portion of the annuities in this country are offered pursuant to employer-operated or sponsored plans which are thus rendered vulnerable. The Ninth Circuit's approach therefore would, contrary to this Court's previous assurance, make Title VII the vehicle to "revolutionize the insurance and pension industries." *Manhart* 435 U.S. at 718. Moreover, if the decision is not reversed, most employers will eliminate the life annuity option from their retirement and pension programs, as has Arizona (Pet. for Cert. at 5). Employees thereby forced onto the open market would lose the benefit of lower group premium rates, and their annuity payments still would be based on sex-related actuarial tables. Because of these potential effects, this case is of manifest concern to EEAC's members, much of private industry and public employers.[1]

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[1] Because of its interest in the relationship between the sex discrimination provisions of Title VII and the Equal Pay Act, EEAC participated as amicus curiae before this Court in *County of Washington v. Gunther*, 101 S. Ct. 2242. EEAC's strong interest in the proper burden of proof requirements of Title VII also is evidenced by its participation in several other cases before the Court. *See*

STATEMENT OF THE CASE

The Arizona Deferred Compensation Plan (the "Plan") was a savings and investment plan established by the state legislature that permitted state employees to defer compensation and, consequently, taxation on that income. Participation in the plan and its various options was completely voluntary. No employer contributions were made under the plan. Employees who chose to participate had a number of options for investment and receipt of proceeds of the plan. At the time of investment, participants could choose to defer their compensation in savings accounts, mutual funds, life insurance, and various annuities (e.g., annuities for a fixed amount, for a fixed period, or life annuities). At the time of withdrawal, participants had several options: (1) lump sum withdrawal of the accumulated proceeds with the discretion to invest the amount in the annuity market for the largest annuity available; (2) receipt of a fixed annuity sum for a fixed period; or (3) participation in a group life annuity program in which the employee would receive a certain amount of money each month for life. The last withdrawal option is at issue here.

Norris, a female employee, chose to participate in the plan and to have her funds invested in a life annuity to be provided by a private company unconnected with the State government. Arizona selected several possible companies with which the employees could invest for a life annuity. It was stipulated that all insurance companies available to Arizona used sex-based mortality tables to compute the monthly amounts due under the life annuity contract. (Cert. Pet. at 3). Under the plan selected by Norris, as with all similar plans which use sex-based mortality tables, similarly situated women and men made

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United States Postal Service Board of Governors v. Aikens, No. 81-1044, *decision pending; Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Furnco Construction Co. v. Waters*, 438 U.S. 567 (1978); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

the same contributions into the life annuity program. Because, however, women live longer than men and, as a group, would receive a benefit of equivalent value over a longer time period to men as a group, female annuitants are paid less per month than male annuitants. Females choosing either the lump sum or the fixed amount/fixed period options, however, would receive the same payments as male annuitants in those programs.

Norris challenged the life annuity part of the Plan, alleging that it violated the sex discrimination provisions of Title VII because of the lower monthly payment to women. Both the district court and Ninth Circuit found the Plan to be discriminatory. The courts acknowledged that the life annuity portion was voluntary and that the employees had several other options from which to choose. Also, the district court's finding that the discrimination was not intentional was undisturbed by the Ninth Circuit. Nevertheless, they ruled that an employer may not offer a fringe benefit resulting in lower monthly payments to females.

Relying almost exclusively on this Court's decision in *Los Angeles v. Manhart*, 435 U.S. 702, the Ninth Circuit, in a 2-1 decision, held that sex-based mortality tables ignored the rights of individual female employees who might not live as long as the mortality tables would indicate. In dissent, Judge Nielsen in *Norris* stated that the plan falls clearly within the *Manhart* "open market" exception. (Pet. App. at A-11).

As a remedy in *Norris*, the employer was ordered to pay retired female employees supplementary amounts so that their future monthly annuity payments would equal those received by similarly situated retired male employees. (Pet. App. at A-3).

SUMMARY OF ARGUMENT

The Arizona life annuity option does not impermissibly differentiate between male and female employees, is based upon valid factors other than sex and falls within the market exception to the *Manhart* decision. The Ninth Circuit's decision misreads *Manhart* and would thwart the Congressional intent recognized therein by effectively forcing employers and employees to make drastic changes in their life annuity programs.

The application of sex-related longevity tables in this case is distinctly different from that found unlawful in *Los Angeles v. Manhart*. Unlike the mandatory retirement plan in *Manhart*, Arizona's option was voluntary and did not require all female employees to receive less take home pay than equivalent male employees. Rather, employees had the discretion to defer their compensation into a large number of options. One option, which concededly did *not* violate Title VII was to withdraw contributions and purchase a life annuity on the open market. Another option, found unlawful, was to purchase a life annuity from the private insurance market through insurance companies screened by the employer. In either event, the insurers based their monthly payments on sex-based actuarial tables that considered employee longevity as much as possible.

The *Manhart* decision stressed that it would not be unlawful

> for an employer to set aside equal retirement contributions for each employee and let each retiree purchase the largest benefit which his or her accumulated contributions could command in the open market.

434 U.S. at 717-18. The Arizona life annuity option cannot be significantly distinguished from the concededly valid lump sum option, as both involve voluntary purchases from private insurance carriers. The life annuity

option, moreover, contains significant advantages by allowing the individual female employee to enjoy full tax deferral benefits plus the advantage of a group insurance rate. If this plan does not fall within *Manhart*'s open market exception, that exception is rendered a nullity. Affirmance of the Ninth Circuit's opinion would thus have the effect of eliminating life annuity programs as presently used.

Arizona's life annuity plan concededly is not intentionally discriminatory. Moreover, it does not differentiate unlawfully on the basis of sex. Both male and female employees receive the same income and same present value of an insurer's promise to continue lifetime payments. "As there is no proof that the package is in fact worth more to men than to women, it is impossible to find any gender-based discriminatory effect in this scheme." *General Electric v. Gilbert*, 429 U.S. 125, 138 (1976). Since the option "offers female and male annuitants benefits of equal value[, it] does not violate Title VII." *Peters v. Wayne State University*, 29 FEP Cases 1753, 1757 (6th Cir. 1982). Moreover, because the annuity payment differentiates between women and men on the basis of longevity, it is not comparable to the retirement program in *Manhart* which discriminated against every female employee and inevitably caused her to receive less protection than all males. *Peters v. Wayne State*, 29 FEP Cases at 1757. Although the longevity-related plan would "distinguish in a crude way between male and female pensioners, because of the difference in thei. average life spans," the Court in *Manhart* stated that "[i]t is this sort of disparity—and not an explicitly gender-based differential—that the Equal Pay Act intended to authorize." 435 U.S. at 713 n.24.

ARGUMENT

I. CONTRARY TO THE INTENT OF CONGRESS AND THIS COURT'S *MANHART* DECISION, THE NINTH CIRCUIT'S OPINION WOULD REVOLUTIONIZE EXISTING PENSION AND RETIREMENT METHODS AND WOULD NULLIFY PURCHASE OF LIFE ANNUITIES ON THE OPEN MARKET

A. Introduction

The Ninth Circuit's opinion misapplies this Court's decision in *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, and misconstrues Title VII's sex discrimination provision as it relates to compensation and benefit systems. The decision below ignores explicit limitations which this Court placed on *Manhart's* liability holding and demonstrates a lack of understanding of the legal ramifications of the insurance options involved. Moreover, the mere presence of a sex-related annuity table led the court to conclude, improperly, that the life annuity option impermissibly "treat[ed] men and women differently"[2] so as to constitute unlawful Title VII discrimination.

As we show below, the record demonstrates no improper differential treatment on the basis of sex and, in any event, there are valid and reasonable nonsex-related purposes for the use of insurance mortality tables. Affirmance of the decision below would cause a major upheaval in the annuity and insurance programs adopted by numerous public and private employers. For these reasons, the decision of the Ninth Circuit should be reversed and vacated.

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[2] *Norris v. Arizona Governing Committee*, 671 F.2d 330, 334 (9th Cir. 1982), *cert. granted*, U.S. No. 82-52; Pet. App. at A-6. The court also erred in holding the employer liable for assisting employees in choosing a benefit provided by insurance companies that relied in turn upon proven, industry-accepted actuarial practices. For the reasons stated fully in Arizona's brief, it should be concluded that "Title VII . . . primarily governs relations between employees and their employers, not between employees and third parties." *Manhart*, 435 U.S. at 718 n.33.

B. Arizona's Life Annuity Option Fulfilled the *Manhart* Open Market Exception and Offered Significant Benefits to Female Participants Over Individual Life Annuity Purchases

Because the legislative history of Title VII's sex discrimination provision is "notable primarily for its brevity,"[3] the courts have been careful not to expand its reach to cover well-established business practices that are not based upon direct evidence of purposeful sex discrimination. As stated in *Willingham v. Macon Tele. Publishing Co.*, 507 F.2d 1084, 1090 (5th Cir. 1975):

> We find the legislative history inconclusive at best and draw but one conclusion, and that by way of negative inference. *Without more extensive consideration, Congress in all probability did not intend for its proscription of sexual discrimination to have significant and sweeping implications. We should not therefore extend the coverage of the Act to situations of questionable application without some stronger Congressional mandate* (emphasis added).[4]

This same restraint was required in this Court's decision in *Manhart*, but was notably absent from the Ninth Circuit's decision below.

Manhart presented a situation markedly different from the option involved in this case and from annuity programs adopted by public and private employers generally. In order to take into account the undisputedly

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[3] *General Elec. Co. v. Gilbert*, 429 U.S. 125, 143 (1976).

[4] In examining allegations of sex-based compensation discrimination, the courts have warned that judges and administrative agencies should be cautious about substituting their judgment for that of employers where there has been no showing of intentional discrimination. *See generally, County of Washington v. Gunther*, 101 S. Ct. 2242, 2249 (1981); and *Kouba v. Allstate Insurance Company*, 30 FEP Cases 57, 59 (9th Cir. 1982). *See also General Electric Co. v. Gilbert*, 429 U.S. 125, 140 n.18, 145-46 (1976), which cautioned against using Title VII to expand traditional concepts of discrimination.

longer life expectancies of female retirees, the employer in *Manhart* established its own retirement plan which *required* all eligible female employees to contribute more into the pension fund than similarly situated eligible male employees. Thus, without having any choice, every eligible female employee "took home less pay than a male employee earning the same salary." 435 U.S. at 705. This plan, therefore, distinguished employees *solely* on the basis of sex. All women would receive smaller paychecks because of their sex—even those who would not live as long as the average male. The Court recognized that the Department's contribution schedule "distinguished only imperfectly between long-lived and short-lived employees, while distinguishing precisely between male and female employees." 435 U.S. at 713 n.24.

This Court went to great lengths, however, to assure that its *Manhart* decision would be narrowly applied and to make clear that it was not establishing hard-and-fast rules that would invalidate more common industry usage of mortality tables. The Court stated:

> Although we conclude that the Department's practice violated Title VII, we do not suggest that the statute was intended to revolutionize the insurance and pension industries. All that is at issue today is a *requirement* that men and women make unequal contributions to an *employer-operated* pension fund. *Nothing in our holding implies that it would be unlawful for an employer to set aside equal retirement contributions for each employee and let each retiree purchase the largest benefit which his or her accumulated contributions could command in the open market.* Nor does it call into question the insurance industry practice of considering the composition of an employer's work force in determining the probable cost of a retirement or death benefit plan. Finally, we recognize that in a case of this kind it may be necessary to take special care in fashioning appropriate relief. (Emphasis added, footnotes omitted).

434 U.S. at 717-18.

The Ninth Circuit below, in assuming that Arizona's life annuity option was facially discriminatory, impermissibly ignored the key element of the *Manhart* exception. As noted, this Court in *Manhart* specifically stated that if contributions were equal for members of each sex, it would not be unlawful to let each retiree purchase the largest benefit which his or her accumulated contribution would buy from the individual's own search of available annuities on the market.

This case presents an ideal manifestation of the market option envisioned by *Manhart*. Whether purchased by individuals or through employer-sponsored group plans, life annuity payments are based upon the life expectancies of the individuals involved. As *Manhart* recognized, most retirement or related plans have a common factor—the plans depend upon anticipated funds to cover contingencies and "[t]he amounts set aside are determined by a painstaking assessment of the insurer's likely liability." 435 U.S. at 721. Annuities purchased on an individual basis from the insurance company of the person's choice still will pay female annuitants less per month than will be paid to equivalent male annuitants.[5]

With this fact in mind, not only did the Arizona plan meet the requirements of the market exception, its practical effect was to place women in a more favorable financial position than if they had gone to the market as individuals. The three options available under the Arizona plan illustrate this point. The Ninth Circuit recognized that the lump sum option "treats men and women the same" (671 F.2d at 335). Women who use the lump sum option to purchase individual life annuities, however, would have to draw their funds out of the group

[5] In its brief to the Ninth Circuit below, the American Council of Life Insurance (ACLI) indicated that it was not aware of any private insurance company offering life annuities to the general public, which offers an annuity that does not calculate benefits in accordance with sex-based actuarial tables. See ACLI Brief Amicus Curiae at 22, n.32.

plan and would lose the tax deferral benefit of the plan. They would find, moreover, that the annuity purchased with the reduced proceeds would provide even smaller monthly payments than under Arizona's life annuity option and they still would receive payments based on sex-related actuarial figures.

Equivalent male and female employees exercising the second option—a fixed sum for a fixed period—would receive equal payments as the number of payments for both sexes would be readily identified. 486 F. Supp. at 648. Of course, if their payments raised them to a higher tax bracket they would pay income tax on their retirement at a faster, and possibly greater rate than they would with life annuity payments under the third option. The second, fixed payment option also presents a decided disadvantage as compared with a life annuity for those persons who might live for enough additional years to receive a greater payout under a lifetime rather than fixed payment schedule.

Most employees, therefore, selected Arizona's third option—the lifetime annuity—probably because of its decided advantages over the lump sum payment which concededly was not unlawful. Life annuities purchased under the third option were purchased on the open market, albeit from one of several possible companies that had been screened by the employer. Recognizing that eligible female employees were completely free to go to other insurance companies, the employer nonetheless provided a valuable service. It assisted annuitants in the painful task of making their own market survey of insurance companies. At the same time, the optional plan retained all deferred income advantages. It also provided higher monthly payments to both males and females because the increased size of the annuitant group permitted more accurate actuarial calculations than would individually-purchased life annuities.

All of the *Manhart* open market requirements, therefore, were met: all options, including the life annuity,

were voluntary, not required; and the contributions by equivalent male and female annuitants were the same. Moreover, the group life annuity purchaser was placed in an enhanced payout position over individual "lump sum" option purchasers. Such an option is *a fortiori* authorized by Title VII when compared with the concededly lawful lump sum payment that is inherently less favorable to female employees.

C. Employer and Employee Responses to the Decision Below Could Disrupt or Even Eliminate the Market for Life Annuities

From the perspective of both private and public employers, the Ninth Circuit's reliance upon *Manhart* to find that Arizona's plan violated Title VII eviscerates *Manhart's* assertion that Title VII was not intended to revolutionize insurance and pension industry practices. As a practical matter, it could lead to the elimination of life annuities from employer-sponsored deferred compensation and retirement plans. Arizona, of course, has discontinued the option. (Pet. for cert. at 5). And even if those plans were not eliminated outright, pension and annuity participation would be changed drastically. The lump sum payment option would become even more undesirable, as female employees would choose the employer-sponsored group life annuity option in anticipation that the employer would be required, as by the Ninth Circuit, to equalize annuity payments for similarly situated male and female employees even if, as here, no employer contributions were contemplated.

As another response, the employer could consider switching to "unisex" tables and provide equivalent life payments to both male and female annuitants. But because the Equal Pay Act would prevent the employer from decreasing monthly payments to male employees in order to equalize payments, the payments to the female

annuitants would have to be increased.[6] *See also, Peters v. Wayne State University*, 29 FEP Cases at 1757. The increased monthly payout to female employees, however, would require an increase in premiums to be paid either by plan participants—both female and male (assuming no Equal Pay Act problems)—or by the employer. If the plan is voluntary, individual males or male-dominated groups and institutions would be likely to move out of annuities with substantial female participation and join with other predominately male groups so as to avoid increased premium payments.[7] Thus, from the employer's standpoint, the life annuity option would be drastically altered. At the same time, however, the use of other insurance plans based upon different actuarial computations would raise a host of difficult and unresolved legal questions.[8]

In sum, the Ninth Circuit's decision not only ignores the market exception provided by *Manhart*, but, in addition, myopically assumes that equal benefits can be provided to employees of both sexes under all circumstances without either directly or indirectly causing a detriment to employees of one sex. By incorrectly concluding that

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[6] The Equal Pay Act states in relevant part that:

> an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

29 U.S.C. § 206(d)(1).

[7] See Bentson, *The Economics of Gender Discrimination in Employee Fringe Benefits: Manhart Revisited*, 49 U. Chi. L. Rev. 489, 538-40 (1982); and Kimball, *Reverse Sex Discrimination: Manhart*, 1979 Am. Bar Fdn. L. Rev. 82, 134-35.

[8] *See, for example, EEOC v. Colby College*, 589 F.2d 1139, 1144-46 (1st Cir. 1978), which discusses the problems *Manhart* did not resolve concerning the use of actuarial tables that did not consider sex-related longevity figures. Such plans would require additional premiums to be paid either by the employer (who might choose to drop all life annuity programs) or the male employees (who might sue on the basis that their increased premiums were illegally tied

Title VII simply dictates equality of benefits regardless of sex under all conditions, the court below ignores the fact that its mandate that Arizona provide equal benefits would nonetheless adversely affect members of both sexes in the manner described above. Title VII does not dictate such a simplistic approach. As *Manhart* recognized, there is no express or implied authorization from Congress to interpret Title VII in such a draconian manner. Moreover, as the following discussion demonstrates, the plan under review here was not discriminatory against female employees and would not fall within Title VII's proscriptions in any event.

II. ARIZONA'S PLAN DID NOT DIFFERENTIATE IMPERMISSIBLY BETWEEN MALE AND FEMALE PARTICIPANTS

A. Arizona's Life Annuity Option Did Not Treat Women Differently than Men Because Similarly Situated Males and Females Received Equivalent Value in Return for Equal Contributions

Not only did the Ninth Circuit misapprehend the applicability of *Manhart's* open market exception to this case, it also misapplied well-established Title VII principles which negate an argument that Arizona's plan involved either unequal treatment or sex discrimination. These standards recently were summarized by the Sixth Circuit in *Peters v. Wayne State University*, 29 FEP Cases at 1755-56:

> Disparate treatment occurs when an employer bases employment decisions on an impermissible criterion, such as sex. An employer need not treat women and men in exactly the same manner. Title VII merely

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to sex-based factors). *See also Sobel v. Yeshiva University*, 477 F. Supp. 1161, 1166 (S.D.N.Y. 1979), which explains, as does the brief of petitioner, the difficulties faced by the employer who wishes to provide a life annuity option and finds that all available insurance plans use sex-based annuity tables.

forbids the employer from acting with the intent to discriminate. *Furnco Construction Co. v. Waters*, 438 U.S. [567, 579-580 (1978)]. See also *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

The Supreme Court has repeatedly discussed the proof requirements in disparate treatment cases. The plaintiff has the initial burden of showing that the employer's practices, "otherwise unexplained, are more likely than not" impermissibly motivated. Id. at 254, citing *Furnco*, 438 U.S. at 577. After the plaintiff has made out a prima facie case, the defendant has the opportunity to rebut the presumption of discrimination by showing a "legitimate nondiscriminatory reason" for its decision. *Burdine*, 450 U.S. at 254; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Finally, the plaintiff has the opportunity to show that the defendant's "reason" is a pretext to mask a discriminatory decision. *McDonnell Douglas*, 411 U.S. at 804. In all cases, the plaintiff retains the ultimate burden of persuading the trier of fact that the employer intentionally discriminated. *Burdine*, 450 U.S. at 256.

There is no question that the Arizona plan was not intentionally discriminatory against females or that it was not a pretext for intentional discrimination. The district court's holding that intent was not proven was not disturbed by the Ninth Circuit.[9] The sole basis, therefore, for the Ninth Circuit's finding of a Title VII violation was its conclusion that the plan was "facially discriminatory" (Pet. App. at A-6; 671 F.2d at 334) because the plan offers "a benefit which favors men" (*Id.* at 335; Pet. App. at A-9). That premise is unsupportable. As now shown, Arizona has articulated legitimate, nondiscriminatory reasons for its offering of an annuity plan through insurance companies that use industry-wide

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[9] See 486 F. Supp. at 651; 671 F.2d at 332. Pet. App. at A-11; A-21.

"acceptable actuarial standards." *Peters*, 29 FEP Cases at 1756.

There is no dispute that "[a]s a class, women live longer than men" (*Manhart*, 435 U.S. at 704) or that the sex-based actuarial tables used by the insurance companies in this case were an accurate and bona fide approximation of the greater longevity of women.[10] As the district court described the tables:

> The parties further agree that for those persons who elect annuity options, the payouts are subject to mortality tables which are published in the contract with the particular company. These payments are calculated on the basis of the present worth of the person's account at the time payments are to begin divided by the months a person of that age and sex is expected to live, and factored by any guaranteed payment period. Because according to the annuity tables females as a class live longer than men as a class, the period of time for which payments are to be made to women would be longer than for men and thus, the periodic payment to women is less than for men. The amounts received are determined by the use of actuarial tables published by the particular company.

486 F. Supp. at 648; Pet. App. at A-15. The sole basis for the lower court's sex discrimination finding is the lesser monthly payments received by female life annuitants. This fact alone, however, does not amount to an unlawful distinction between the sexes.

The employer in *Manhart* used annuity tables to differentiate between male and female employees on a much different basis than the employer in the instant case or employers generally. To finance the greater pension benefits that women as a group would receive, the Department in *Manhart* required women to contribute more

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[10] "Like King Canute, neither the Congress nor a court can change the forces of nature" that result in women generally living longer than men. *EEOC v. Colby College*, 589 F.2d at 1144.

than men. Each individual woman took home less income than a man who performed the same job. As a result each and every female employee "earned less money than men for the same jobs" no matter how long she actually lived after retirement. *Peters v. Wayne State University*, 29 FEP Cases at 1756.

Because every women would suffer from the application of a sex-based stereotype, use of the tables in *Manhart* thus was discriminatory in the same fashion as is a blanket exclusion of individually qualified women from jobs traditionally held by males because of sex-based stereotypes. Sex-based mortality tables, however, have a markedly different nature. They treat females as individually as is feasible in light of the unknowable length of each individual life. "Unlike the possibility, for example of properly testing job applicants for qualifications before employment, there is simply no way to determine in advance when a particular employee will die." *Manhart* 435 U.S. at 724 (Justice Blackmun, concurring).

Title VII, moreover, provides a defense to allegations of sex discrimination where employees of one sex have been excluded from certain positions on the basis of a bona fide occupational qualification (BFOQ) where, among other things, it is impossible or highly impractical to deal with persons affected by the rule on an individualized basis (i.e., individual examinations would not enable an employer to distinguish the qualified from the unqualified). *See e.g., Diaz v. Pan American Air World Airways, Inc.*, 442 F.2d 385, 388-89 (5th Cir. 1971), *cert. denied*, 404 U.S. 950 (1972).[11]

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[11] *Cf.*, EEOC's BFOQ guidelines under the Age Discrimination in Employment Act, 29 U.S.C. § 621, et seq., which have borrowed Title VII's sex discrimination BFOQ standards and which permit the employer to demonstrate that "some of the individuals so excluded possess a disqualifying trait *that cannot be ascertained except by reference to age.*" (Emphasis added). 46 Fed. Reg. 47725 (codified at 29 C.F.R. § 1625.6).

Unlike the plaintiffs in *Manhart*, similarly situated male and female beneficiaries of most retirement or deferred income plans make equal contributions toward their annuities, take home the same income and, at the same time, are eligible to receive in the future a pension or annuity of *the same present value to each individual*, even though the future annuity payments are computed by the use of sex-based actuarial tables.

By focusing exclusively on the dollar amount of each separate, periodic payment to female annuitants, the Ninth Circuit disregarded other important characteristics that validate the annuity plan. As noted, men and women receive identical payments for work performed. There is, however, a substantial time difference between payment of compensation for the work performed and the receipt of retirement benefits. The funding for defined contribution plans is certain; the actual aggregate payments are not and cannot be fully determined until all participants in the plan are deceased. Because of these uncertainties,

> *If any part of either wages or contributions is to be paid in the future, a proper valuation procedure requires that part to be discounted to present value as of the time the work is performed.* If any part is to be paid only on the contingency that the employee is still alive, it must also be *discounted* by the probability that the employee will survive. Only in this way can the compensation be made commensurable with other compensation and then compared with it. It does not matter that the interest rate for discounting purposes and the actuarial probability for ascertaining whether payment will be made at all are, at best, only informed estimates. *Not to use such a discounting procedure is to assume that money has no time value and that all employees will certainly survive to some future date, both of which assumptions we know to be erroneous.*

See Kimball, *Reverse Sex Discrimination: Manhart*, 1979 Am. Bar Fdn. Res. J. 83, 98.

Thus, under a plan in which payments are based on sex-related actuarial tables, equivalent male and female employees are treated the same if they make equal payments into a retirement or deferred compensation plan, or if the employer makes identical contributions into the fund for similarly situated male and female employees. Both groups receive the same present value from the protection and guarantee provided by an insurance-type product for which the employer has provided or made available to employees of both sexes. Accordingly, "[i]t is the employer's [equal] payments toward the insurance policy or arrangement (or the present or actuarial value of the future benefits) that is the compensation, not the periodic payout derived from the policy." Kimball at 102.

Over the term of the payout period, of course, male and female annuitants can have both similar and widely varying experiences. Members of each group may die early, or live far beyond the actuarial estimates. All, however, will receive the benefit of the insurer's or employer's promise that periodic annuity payments would continue until their death. In that respect, all employees are treated identically. As one commentator has explained:

> To understand insurance, one must realize that *the purchaser of a policy is not buying the amount that will be remitted should the unwanted event occur, but the promise that if the event occurs, the designated amount will be paid.* Thus both the insured who does not die during the period covered by the life insurance policy and the insured who does [die] have purchased and received the same product. Similarly, after a life annuity contract has been executed, an annuitant who lives for thirty years and an annuitant who dies the next day have *both received the same product* for their money . . . . *Therefore, insurance necessarily involves circumstances in which the events insured against will not be precisely*

predictable, and in which the payments made to individual insureds will not be equal.

Benston, *The Economics of Gender Discrimination in Employee Fringe Benefits: Manhart Revisited*, 49 U. Chi. L. Rev. 489, 497 (1982).

Sex-differentiated tables, moreover, are widely used by the insurance industry and employers to calculate the present value of retirement benefits to individuals. The common and widely accepted explanation of the use of these tables may be set forth as follows:

> It is quite possible that in the present state of our knowledge, age and sex are the only two facts about the individual that will significantly help us—at reasonable cost—to calculate probable length of life. Whether available complementary information should be used too to further refine (complicate) the classification system should depend on a cost-benefit analysis. But if looking at relevant facts about the individual is what the statute commands, it is absurd to ignore sex to refine the calculations as far as possible at reasonable cost, merely because no other variables are both useful and manageable.

Kimball, 1979 Am. Bar. Fdn. Res. J. at 120.[12]

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[12] Some have argued that insurance companies or employers discriminate on the basis of sex when they use sex-related annuity tables, but do not use other possibly relevant tables based upon the life expectancy of smokers, drinkers or heavy eaters. Nonuse of such factors, however, does not indicate that sex-based tables are discriminatory. Where feasible or economical, those other factors are commonly relied upon by companies in underwriting other types of policies. Indeed, use of such factors might benefit the insurance company who could use them as a basis for higher premiums or less policy coverage. See Lautzenheiser, *Sex and the Single Table: Equal Monthly Retirement Income for the Sexes?*, 2 Employee Benefits J. 8, 38 (1976).

Use of those other factors in the annuity area, however, may not be practical as a general practice. Because smoking, obesity and other health problems often shorten the life of the individual, lump sum payments or life insurance are often more attractive. Thus, it

Sex-related annuity tables, therefore, are not relied upon merely because certain annuitants are female. The sex of annuitants, along with age, constitute a rational and substantiated element in determining the longevity patterns of the beneficiaries of life annuity programs.[13]

To summarize, the Arizona plan was not facially discriminatory because the employees were treated equally, whatever their sex. All employees were totally free to decide whether to participate in the deferred compensation plan and had several options concerning the annuity program, if any, in which to participate. All received the same take-home pay and identical present value and expectations of their selected life annuity. Unlike *Manhart*, no differentiation between male and female groups occurred.

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could be expected that a person who has developed health problems from factors such as smoking might well choose a life insurance program, rather than a life annuity designed to benefit those who live longest. *See* Benston, 49 U. Chi. Law Rev. at 518. "Because of this self-selection for individually purchased annuities and because employment annuities are paid only to people who are well enough to retire, insurers assume that annuitants are likely to live longer than people in general, and the mortality tables take this expectation into account" (*Id.* at 518-19). Insurers, moreover, have experienced that factors such as smoking, heredity, or personality problems may be misrepresented by the insured, may not be subject to sufficient statistical experience or do not predict the annuitant's condition at the time the annuity is to be paid. (*Id.*) As discussed above, however, there is detailed and virtually undisputed evidence of a statistically significant correlation between sex and longevity.

[13] It is also true that sex-based mortality tables often *favor women*. Indeed, with respect to employer-sponsored individual life insurance plans, the almost universal practice is to charge females *lower* premiums than males. Benston, 49 U. Chi. L. Rev. at 532 n.135.

B. Under *General Electric* and *Geduldig*, There is No Unlawful Title VII Benefit Discrimination If Each Class Receives Equivalent Protection and Value from the Program

As shown, the plan in question does not involve direct compensation but the determination of the equality of benefit plans. This Court's decisions in *General Electric v. Gilbert*, 429 U.S. 125, and *Geduldig v. Aiello*, 417 U.S. 484 (1974), readily dispose of the Ninth Circuit's conclusion here that the benefit plan is impermissibly discriminatory between the sexes. The Supreme Court in *General Electric* began its analysis by noting that "[a]s in *Geduldig*, we start from the indisputable baseline that '[t]*he fiscal and actuarial benefits of the program . . . accrue to members of both sexes*,' 417 U.S. at 497 n.20." 429 U.S. at 139 (emphasis added).[14] The Court in *General Electric* further explained (429 U.S. at 138):

> The "package" going to relevant identifiable groups we are presently concerned with—General Electric's male and female employees—covers exactly the same categories of risk, and is facially nondiscriminatory in the sense the "[t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." *Id.*, at 496-497, 94 S. Ct., at 2492. *As there is no proof that the package is in fact worth more to men than to women, it is impossible to find any gender-based discriminatory effect in this scheme.* . . . (Emphasis added).

The Court indicated that the plan in *General Electric* had not been shown to "discriminate against any definable group or class in terms of the aggregate risk protec-

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[14] Although Title VII was amended in 1978 to expand the definition of sex to include pregnancy and related medical conditions in the wake of the Court's decision in *General Electric*, the amendment does not affect the Court's analytical framework with respect to evaluating the equality of benefits in general. See 42 U.S.C. § 2000e(k).

tion derived by that group or class from the program." 429 U.S. at 138. In the Court's view, the plan was "nothing more than an insurance package, which covers some risks, but excludes others . . . ." (*Id.*) The Supreme Court stressed in *General Electric* that "gender based discrimination does not result simply because an employer's disability benefits plan is less than all inclusive." 429 U.S. at 138.

General Electric further stated that "absent proof of different values" (429 U.S. at 139 n.17), the cost of insuring against future risks is essentially extra compensation. The Court noted that if the employer were to discontinue the benefit and increase wages by the same amount, "there would clearly be no gender based discrimination," (*Id.*) even if the female would have to pay more than a male employee to purchase disability insurance on the open market. Thus, under *General Electric*, an employer cannot be required to pay an additional amount in benefits to female employees merely "because of their differing roles in the 'scheme of human existence' " (429 U.S. 139 n.17). Having provided similarly situated male and female employees a benefit of equivalent present actuarial values, the employer in *General Electric* was not required by Title VII to do more.

General Electric and *Geduldig* recently were relied upon by the Sixth Circuit to reverse a district court finding that Title VII was violated by a retirement program under which female employees paid equal premiums as, but received smaller monthly retirement payments than, similarly situated males. Dismissing the suit, the court held that the "retirement benefits package which offers female and male annuitants benefits of equal value does not violate Title VII. The retirement plan is not worth more to men than to women." *Peters v. Wayne State University*, 29 FEP Cases at 1757. The court in *Peters* correctly noted that:

> Common sense supports this holding. Plaintiffs point out that individual women may not live to the pre-

> dicted statistical age of death and, therefore, may not recover the full actuarial value of their retirement packages. This argument is equally true for men. After death the total benefits received could be calculated to determine whether a man or a woman has received more money. But because annuity payments must be calculated prior to death, insurers and employers must use the only tools available to calculate payments, mortality tables. Both women and men may not live to the predicted statistical age but both women and men have the *same probability* of living to the predicted statistical age. (Emphasis in original).

29 FEP Cases at 1757. For the reasons stated, the Ninth Circuit incorrectly ruled that Arizona's plan discriminated on its face against female life annuitants because monthly payments to them were less than those made to equivalent male employees.[15]

III. ARIZONA'S PLAN WAS ALSO PERMISSIBLE BECAUSE THE LIFE ANNUITY PAYOUTS WERE BASED UPON FACTORS "OTHER THAN SEX"

Title VII incorporates the affirmative defenses of the Equal Pay Act and authorizes employers to differentiate in compensation between similarly situated male and female employees as long as the differential is based upon "other factors other than sex." *County of Washington v. Gunther*, 101 S. Ct. at 2248. In light of the previous discussion, it is readily apparent that a "factor other than sex" was relied upon to establish the annuity tables in this case. Like the disability insurance insurance program in *Geduldig v. Aiello*, the Arizona life annuity program was designed "to function essentially in accordance with insurance concepts." 417 U.S. at 492. The payment schedule here is directly related to insurance industry ac-

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[15] Because female annuitants did not receive a different benefit than male annuitants, there can be no merit to the Respondents' contention that the plan had a disparate impact on female participants. See Respondents' Brief in Opposition to Petition for Writ of Certiorari, at 5.

tuarial estimates that have not been challenged as inaccurate or intentionally discriminatory against females. The plan, moreover, "is thus structured in terms of the level of benefits and the risks insured to maintain the solvency of the [plan]." *Id.*

As in *Peters v. Wayne State University*, the annuity payment amount "differentiates between women and men *on the basis of longevity solely*." 29 FEP Cases at 1757. Thus, the *Peters* decision stated:

> Wayne State's selection of a retirement plan which calculates annuities from sex-segregated mortality tables is not the "kind of 'artificial, arbitrary and unnecessary barrier to employment' which the Court found to be the intention of Congress to remove." *McDonnell Douglas* [*v. Green*, 411 U.S. 792, 806 (1973)] quoting *Griggs* [v. *Duke Power Co.*, 401 U.S. 424, 431 (1971)]. It is not a "built-in headwind" unrelated to an individual's longevity because longevity cannot be measured on an individual basis. We conclude that Wayne State has not violated Title VII by providing women and men equal retirement annuity benefits with different disbursement rates.

29 FEP Cases at 1757. As the longevity factor was 'reasonabl[e] in light of the employer's stated [business] purpose" [16] it constitutes a factor other than sex authorized by Title VII and the Equal Pay Act.

For reasons not present here or in most deferred income or retirement annuity plans, the Court in *Manhart* questioned the employer's defense that its program was based upon the longevity of its employees. As previously noted, in *Manhart*, increased contributions were deducted directly each month from each female employee's take home pay. Thus, the *Manhart* plan "on its face, discriminated against every individual woman employed by the Department." 435 U.S. at 716. It "distinguished only imperfectly between long-lived and short-lived employees,

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[16] *Kouba v. Allstate Insurance Company*, 30 FEP Cases 57, 59 (9th Cir. 1982).

while distinguishing precisely between male and female employees." 435 U.S. at 713 n.24. The longevity of individuals was completely disregarded. Instead of giving similarly situated male and female employees an equivalent present actuarial value of a future annuity, the *Manhart* plan distinguished precisely and categorically between male and female employees.

Manhart, however, indicated that retirement payments based on "longevity" would be permissible, as employees with longer lives would receive more money than comparable employees with short lives. Although the longevity-related plan would "distinguish in a crude way between male and female pensioners, because of the difference in their average life spans," the Court noted that "[i]t is this sort of disparity—and not an explicitly gender-based differential—that the Equal Pay Act intended to authorize." 435 U.S. at 713 n.24. By reversing the Ninth Circuit and holding in this case that Arizona's plan did not violate Title VII, the Court would avoid disrupting mortality tables that are almost universally used in life annuity programs and relieve employers of the dilemma of being "damned in the discrimination context no matter what [they do]." *Manhart*, 435 U.S. at 721 n.38.

CONCLUSION

For the reasons stated, the decision of the Ninth Circuit below should be reversed.

Respectfully submitted,

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